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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 VENSON LANE MYERS,

12 Plaintiff,

13 vs.

14 L E SCRIBNER, Warden; J M  
BUILTEMAN, Associate Warden;  
CHARLES RICHEY, Chaplain,

15 Defendants.  
16

CASE NO. 09cv1425 WQH (PCL)

**ORDER**

17 HAYES, Judge:

18 The matters before the Court are the Amended Motion to Dismiss filed by Defendants  
19 (Doc. # 10) and the Report and Recommendation filed by the Magistrate Judge (Doc. # 15).

20 **BACKGROUND**

21 Plaintiff, an inmate proceeding *pro se* and *in forma pauperis*, initiated this action by  
22 filing his Complaint on June 30, 2009. (Doc. # 1). Plaintiff alleges a claim pursuant to 42  
23 U.S.C. § 1983 for violation his First Amendment right of free exercise of religion and a claim  
24 pursuant to the Religious Land Use and Institutionalized Persons Act ("RILUPA"). Plaintiff's  
25 claim relates to the denial of his request to have a religious feast for 800 inmates and the  
26 cancellation of worship services by the prison Chaplain, allegedly in retaliation for Plaintiff  
27 submitting a grievance form appealing the decision on the feast. *See id.*

28 Plaintiff previously filed a claim in this district based on the same incident. *See Compl.*,

1 Doc. # 1, *Myers v. Scribner*, 08cv117 W (Wmc) (S.D. Cal. Jan. 1, 2008). On March 23, 2009,  
2 that case was dismissed without prejudice for failure to exhaust administrative remedies. *See*  
3 Order Dismissing Complaint, Doc. # 27, *Myers*, 08cv117 W (WMc), (S.D. Cal. Mar. 23,  
4 2009). The Court found that Plaintiff failed to file an appeal from a first-level administrative  
5 decision on Plaintiff's grievance which denied Plaintiff's request to have 800 inmates present  
6 at his proposed feast and denied that the Chaplain cancelled worship services in retaliation for  
7 Plaintiff's appeal. *Id.*

8 On March 29, 2009, Plaintiff requested a second-level review of his grievance, which  
9 had initially been filed on October 8, 2007. (Doc. # 1-1 at 3). On April 1, 2009, the appeal  
10 was denied because Plaintiff had failed to appeal in a timely fashion and had not provided an  
11 explanation of the delay. *Id.* at 5. The order denying the grievance appeal informed Plaintiff  
12 that if he wished to pursue his appeal, he was required to provide an explanation of why he  
13 could not timely file his appeal. *Id.* On April 5, 2009, Plaintiff filed a second second-level  
14 appeal which stated "I'm submitting this 602 for exhaustion purposes! Your form required an  
15 explanation before proceeding so now you can give your final finding on the issue." *Id.* at 6.  
16 On April 9, 2009, Plaintiff's second-level appeal was denied as untimely filed. *Id.* at 7.  
17 Plaintiff did not file a third-level appeal.

18 Plaintiff then filed this Complaint. (Doc. # 1). On October 28, 2009, Defendants filed  
19 their Amended Motion to Dismiss. (Doc. # 10). The motion contends Plaintiff failed to  
20 exhaust administrative remedies, that Plaintiff's claims against Defendants in their official  
21 capacities are barred by the Eleventh Amendment, that Defendant Scribner cannot be held  
22 liable under a respondeat superior theory, that Plaintiff has failed to state a claim, and that  
23 Defendants are protected by qualified immunity. *See id.*

24 On May 24, 2010, the Magistrate Judge issued his Report and Recommendation  
25 ("R&R"). (Doc. # 15). The R&R concludes Plaintiff failed to exhaust his administrative  
26 remedies prior to bringing this claim. *Id.* at 5. The R&R concludes Plaintiff failed to submit  
27 an appeal of the first-level decision rejecting his grievance claim within the fifteen-day time  
28 limit to appeal. *Id.* at 6. The R&R concludes that when Plaintiff attempted to appeal the

1 decision over a year after receiving the initial decision, he failed to offer an explanation for the  
 2 delay, even after being told by prison officials that he must do so. *Id.* The R&R concludes that  
 3 Plaintiff failed to appeal the second-level appeal decision which determined his appeal was  
 4 untimely to the third level. *Id.* Therefore, the R&R recommends that the Court dismiss  
 5 Plaintiff's Complaint. *Id.* at 8-9.

6 The R&R states that objections were due on or before June 15, 2010. *Id.* at 9. Plaintiff  
 7 filed an objection on June 23, 2010, which was entered on the Court's docket on June 30,  
 8 2010. (Doc. # 17). Plaintiff's objection cites a number of biblical passages and the California  
 9 Department of Corrections and Rehabilitation Operations Manual. *Id.* at 2. Plaintiff also  
 10 contends "that the[re] was no opportunity given for the exercise of the grievance system  
 11 according to said system outlined by the report in accordance with the time line." *Id.* The  
 12 Court extended the date to reply to Plaintiff's objection until July 15, 2010 to allow Defendants  
 13 to file any response to the late-filed objection. (Doc. # 18). Defendants did not file a reply.

#### 14 **APPLICABLE LAW**

15 The duties of the district court in connection with the Report and Recommendation of  
 16 a Magistrate Judge are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28  
 17 U.S.C § 636(b). The district judge "must make a de novo determination of those portions of  
 18 the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in  
 19 part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b). The  
 20 district court need not review *de novo* those portions of a Report and Recommendation to  
 21 which neither party objects. *Wang v. Masaitis*, 416 F.3d 992, 100 n. 13 (9th Cir. 2005); *United*  
 22 *States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc).

23 Pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a)

24 No action shall be brought with respect to prison conditions under section 1979  
 25 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other  
 26 Federal law, by a prisoner confined in any jail, prison, or other correctional  
 facility until such administrative remedies as are available are exhausted.

27 Even if the remedies are no longer "available" to a prisoner as a practical matter  
 28 because the prisoner has failed to timely file, the prisoner may not simply sue in federal court.

1 See *Woodford v. Ngo*, 126 S.Ct 2378, 2386 (2006). “Proper exhaustion demands compliance  
2 with an agency’s deadlines and other critical procedural rules because no adjudicative system  
3 can function effectively without imposing some orderly structure on the course of its  
4 proceedings.” *Id.*

5 The Court has reviewed *de novo* the Magistrate Judge’s determination that Plaintiff  
6 failed to exhaust. The Court has also reviewed the documents Plaintiff attached to the  
7 Complaint, in particular the record of Plaintiff’s administrative proceedings after his previous  
8 lawsuit was dismissed. The Court concludes that the Magistrate Judge correctly determined  
9 that Plaintiff failed to exhaust his administrative remedies. Although Plaintiff objects that he  
10 can no longer exhaust his administrative remedies because he failed to file his second-level  
11 appeal until fifteen months after his grievance was denied, pursuant to the Supreme Court’s  
12 holding in *Woodford*, Plaintiff’s failure to comply with deadlines does not allow Plaintiff to  
13 bypass the exhaustion requirement.

#### 14 CONCLUSION

15 IT IS HEREBY ORDERED that the Report and Recommendation (Doc. # 15) is  
16 **ADOPTED** in its entirety. Defendants’ Motion to Dismiss (Doc. # 10) is **GRANTED**.

17 DATED: August 10, 2010

18   
19 **WILLIAM Q. HAYES**  
20 United States District Judge  
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